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No. 05-1454

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IN THE

Supreme Court of the United States

JAMES M. ERIKSON, *et al.*,
Petitioners,

v.

FARMERS GROUP, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY TO RESPONDENTS' RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI
QUESTIONS PRESENTED

1. Whether the court properly considered the allegations contained within the complaint *in the light most favorable* to the nonmoving party for purposes of a Fed. Rule of Civ. Proc. R. 12(b)(6) dismissal, when the court clearly ignored paragraphs one through seven (1-7), of the second amended complaint? (Appendix F p. 56a-58a) (Order of 11-20-03 Appendix D p. 16a-20a).

2. Whether the cause of action (and statute of limitations) commenced upon the discovery of the frauds concealed by the third party insurance company; and if not, whether equitable tolling should apply to the state law statute of limitations when a third party successfully concealed the fraud, and as a result, precluded the knowledge of the cause of action against the third party until said discovery?

3. Whether the allegations that, "The Defendants have conspired or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law," ¶ 1 Second Amended Complaint (Appendix F p. 59a-60a and 63a-65a) contained a sufficient allegation of "ongoing pattern or practice" and "open continuity" for purposes of RICO in order to survive a 12(b)(6) Motion to Dismiss?

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REPLY TO RESPONDENTS' RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Petitioners' Petition for Writ of Certiorari was submitted concerning disagreements with the application of the law concerning the statute of limitations as codified under Oklahoma law 12 O.S. 95, and under the statute of limitations for Civil RICO.

While there is no dispute that Oklahoma does apply a two-year limitation period on many causes of action, Oklahoma law does in fact under Title 12 O.S. 95 extend its two-year period of time, when fraud is involved, with the statute of limitations beginning on the date that the fraud was first discovered. Petitioners believe this short reply addressing both newly discovered evidence (see Para. 9 of Reply), as well as the factual issues misrepresented by the Respondents' initial response was specious.

1) Much of the Respondents' response focuses inaccurately on rehashing the underlying Oklahoma State Court Trial in which Respondents', an insurance company, was never a party.

2) Respondents' response represents their continued effort to try and confuse the Court, by addressing various issues other than the Respondents' fraud, which Petitioners initially discovered August 14, 2000, the rest is non sequitur. See Pg. 8, Para (A) of Petition of Certiorari.

3) Respondents erroneously represented that Para. 1 of Petitioners second amended complaint was raised "too late," and that a pattern of racketeering activity was not alleged. Clearly this conflicts with the record. Appellants' Opening Brief filed of record, with the Tenth Circuit Court of Appeals, spells out Respondents' pattern of racketeering as does Appellants' Petition for Rehearing En Banc (also filed of record at the Tenth Circuit Court of Appeals) which requested review of said facts.

4) Clearly each of these documents reflect that the ongoing pattern was raised, from the very commencement of Petitioners' various appeals, but Respondents' previously successful trickery lured the lower courts into believing a RICO pattern was not raised even though the record clearly reflects exactly the opposite. Respondents apparently believe that misleading statements made are somehow justified. Petitioners object to Respondents' strategy of misrepresentation.

5) Respondents continue to avoid the issue of Petitioner Erikson's discovery of the Respondents' fraudulent letter that was discovered for the first time on August 14, 2000 and ultimately led to discovery of Respondents numerous other letters. In essence Respondents admit to this by their absolute lack of response relating to the discovery of the fraud. The statute of limitations under Oklahoma law commences when fraud is discovered. Therefore Petitioners' initial com-

plaint filed with the district court was filed timely under Oklahoma two-year statute of limitations relating to discovery of fraud. See 12 O.S. § 95(3).

6) Respondents urge the courts to ignore or disregard Oklahoma's express statute of limitations codified at 12 O.S. § 95(3), which specifically states that the statute of limitations commences upon the discovery of fraud which in this case was August 14, 2000. This is the law in Oklahoma.

7) It appears the Respondents are now attempting to raise the RICO four year statute of limitations as a defense; however, **"nearly four years,"** does not reach the four-years statute of limitation for purposes of the Racketeer Influenced and Corrupt Organization Act (RICO). 18 USCA § 1961 *et seq.*

8) Additionally, in Respondents' Motion to Dismiss filed with the district court, the Respondents' did not allege 'lack of pattern,' as a defense; instead, the court raised 'lack of pattern' in its final order. The trial court clearly missed that the pattern was in fact alleged in the first paragraph of the Petitioners' Second Amended Complaint. Had the pattern or lack thereof been at issue in Respondents' Motion to Dismiss, Petitioners would have pointed out paragraph one to the trial court at that time, in contrast to Respondents' averment the same was never raised. Pattern simply was not raised in the Motion to Dismiss; however, as stated, *supra*, same was raised by Petitioners at the Tenth Circuit Court of Appeals.

9) Respondents' represent "that this is a party-specific case of no significance to anybody but the parties to it." (See Pg. 2; Para. 1 Respondents' Response). Respondents' representation is certainly not borne out by the facts. The fraudulent letters Petitioners complained of in their complaint were written in 1998, but Appellants' discovered on or about September 13, 2006 that as late as the year 2003, Respondents were still using and sending out "thousands" of the same fraudulent letters to all medical providers of litigants against them, in order to illegally obtain confidential medical records.

See *Setzer v. Farmers Ins. Co., Inc.*, 2006 WL 1720186 (10th Cir.(Okla) (unpublished). Similar to the case at bar, in *Setzer* the tort-feasor was insured by the Respondent and a state court action was filed for payment of personal injuries. During the discovery phase of the case, Respondents' obtained a limited medical release for "lower back, legs and feet," and no medical records prior to 1991. Instead, Respondents' sent all medical providers a letter which stated [inter alia]:

> "Please forward to our office the complete medical records (every page) including office notes, handwritten notes, initial intake questionnaire, laboratory test results, medical reports, and correspondence received from or rendered to other persons, progress or office notes, x-ray reports, consulting reports, medical liens, all medical bills and all other information, including doctor's notes and reports contained in the patient's chart or file. Please understand that this request is for copies of existing records only, and no request is being made at this time for a new narrative report."

The similarity of the letters at issue when compared with the letters sent by Respondents to medical providers of Ms. Setzer some five (5) years after the Appellants' case is certainly telling as to Respondents' ongoing fraudulent activities. In *Setzer*, though it was a relatively minor fender bender automobile accident, Respondent insurance company went so far as to even obtain Ms. Setzer's gynecological records which contain confidential medical information which Ms. Setzer's husband did not have knowledge of. This policy is apparently used to harass and intimidate claimants.

The widespread fraudulent activity of the Respondents continues to be and still is a danger to anyone who makes a claim against Respondent insurance company.

In contrast to *Setzer*, in the case at bar the Respondents' in-house attorneys themselves drafted the two (2) separate orders of "Waiver of Medical Privilege," in which Respondents promptly, knowingly and intentionally violated by fraudulent

Appellant Kilgallen and Erikson's medical privileged information by the Respondent using fraudulent letters. In all cases Respondents' perpetrated these frauds in secret and without the knowledge or authority of the victims.

10) It should be noted that in the *Setzer* case, Respondents were sending out similar letters as late as 2003, when the *Setzer* case was before the Tenth Circuit Court of Appeals. This was also the same period that this case was before that Honorable Court (Erikson et. al. Oral Argument was on September 14, 2005, and *Setzer's* Oral Argument was on November 15, 2005.) Even more telling, the same law firm, and at least one of the same attorneys, are in common in these appeals and in their filings in both cases. Yet Respondents' response (Pg. 8, Para. 2) implies this was an isolated incident. ". . . The sending of that one letter to multiple recipients was the sole occurrence of allegedly tortious conduct supporting Petitioners' state law claims and the sole alleged predicate act supporting their RICO claim. . ." This is no isolated incident but a widespread practice of trickery and deception by Respondents. Respondent sent out thousands of similar letters over the years and this must be stopped in the public interest.

11) In addition, Appellants submit that they have pleaded a sufficient number of violations for purposes of establishing a RICO claim (well over the predicate two violations and including some 56 fraudulent letters written by the Respondents to unlawfully obtain via interstate US Mail and Wire medical records protected by privilege and court order) and that they should be allowed to pursue their RICO claims against Appellee. Petitioners should have the opportunity to discover and prove their theory that Respondents' fraudulent activity is an ongoing enterprise which is conducted in secret. Petitioners Complaint did set forth material facts sufficient to provide evidence in support of their claims.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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